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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

DAVID SAXE PRODUCTIONS, LLC

V THEATER GROUP, LLC,

Respondents,

and

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE TECHNICIANS, ARTISTS, AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA, LOCAL 720, AFL-CIO,

Charging Party/Petitioner.

No. 28-CA-219225
28-CA-223339
28-CA-223362
28-CA-223376
28-CA-224119
28-RC-219130

PETITIONER'S ANSWERING BRIEF IN RESPONSE TO RESPONDENTS' EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. INTRODUCTION

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, Local 720, AFL-CIO ("Union"), as Charging Party/Petitioner, files this Answering Brief to Respondents' exceptions to the August 27, 2019 decision (ALJD) of Administrative Law Judge Mara-Louise Anzalone (ALJ).1

The Charging Party/Petitioner agrees and joins with the analysis and argument as set forth in the Answering brief of counsel for the General Counsel. The Union in addition provides additional briefing herein and regarding its accompanying cross-exceptions.

II. ARGUMENT

A. The ALJ gave the appropriate weight to Respondents' contention that Pendergraft mismanaged the production department before DeStefano took over

Respondents take exception to the ALJ's rejection of their argument that former Production Manager Jason Pendergraft's apparent mismanagement offers a substantial alternative explanation behind much of Respondents' discriminatory conduct. Respondents argue that upon terminating Pendergraft, Tiffany DeStefano was "thrust" into Pendergraft's supervisory role and had to quickly enact a plan to restructure the department with no prior management experience or training on how to manage or discipline employees. Respondents maintain that this background serves as an explanation for DeStefano's conduct, including the alleged enforcement of policies previously unenforced by Pendergraft and DeStefano's lack of sufficient documented reasons for terminating the discriminatees.

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[1] References to the decision of the ALJ shall be cited herein as "ALJD," followed by the page and line number.

While Respondents are correct that a new manager has the right to "steer the ship in the correct direction," they presume that the ALJ disregarded DeStefano's steering abilities (which Respondents argue were amateurish). However, the ALJ did not cite the enforcement of previously unenforced policies as evidence of discriminatory conduct itself. To the contrary, it was a lack of documentation concretely citing violations of company policy as a justification for discharging union adherents. Respondents, in their exceptions, attempt to make the case that DeStefano was so inexperienced and lost as a manager when she took over that she was unaware of how to document justifications for termination besides an employee having a "bad attitude." This explanation Respondents put forth is vague, unlikely in light of the circumstances, and not more comparatively plausible than the ALJ's finding that "attitude" was a euphemism for pro-union sentiment.[2] ALJD 22:42-43, 23:1-10. Moreover, DeStefano's inexperience fails to explain or address why she had previously "ranked" the discriminatees' job performance among the best of Respondents' employees if their performance, as alleged by Respondents, was actually poor.

B. The ALJ correctly found a retaliatory mass discharge by Respondents

Respondents take exception to the ALJ's finding that the Respondents committed a mass discharge of employees Hill, Glick, Bohannon, Graham, Gasca, Langstaff, Franco, S'uapaia, and Michaels in retaliation for their union activity. They argue that there were legitimate reasons for terminating these employees and disagree with the ALJ's finding that these employees were all union adherents. As previously noted, however, Respondents failed to put forth contemporaneous documentation supporting their position that the employees were terminated for reasons other than their union activity. Again, Respondents argue that

[2] This explanation also fails to recognize David Saxe's testimony that he worked to train DeStefano on how to supposedly properly "document" discipline and terminate employees.

Pendergraft's mismanagement coupled with DeStefano's inexperience explains the conspicuous discrepancies in the discriminatees' personnel action forms ("PAFs"). For the same reasons articulated above, this explanation is inadequate justification for DeStefano's evidently discriminatory decisions and overturning the ALJ's findings concerning the mass discharge of the above named discriminatees is unwarranted. The Board should thus uphold the ALJ's finding that Respondents engaged in a retaliatory discharge of the above-named employees due to their union activity.

C. The ALJ's credibility determinations were appropriate and within her discretion

Respondents take exception to the ALJ's credibility determinations regarding their witnesses DeStefano and Saxe. They argue that when an ALJ bases her decisions on factors other than demeanor, such as upon the content or quality of the testimony, a witness's memory or the witness's precision versus tendency to exaggerate in testifying, the Board should independently assess such testimony. Applied to the ALJ's decision at issue, Respondents argue that the ALJ has inappropriately based her credibility determinations on Respondents' witnesses' propensity to exaggerate, seemingly rehearsed delivery, lapses in memory, histrionic testimony, and tendency to blame Pendergraft for "everything but the weather."

Respondents simultaneously contend that—despite these various considerations—the ALJ made numerous *incorrect* credibility determinations based on factors other than demeanor or without sufficient explanation. They also contend that the ALJ's credibility determinations and fact-finding were undermined by her "ignoring" evidence which Respondents believe to have been probative.

There are two salient flaws to Respondents' exception to the ALJ's credibility determinations. First, at least several (if not all) of the aforementioned considerations can be

fairly categorized as demeanor. Exaggeration, mechanical delivery of testimony that consequently appears rehearsed, and histrionic delivery that appears theatrical or melodramatic are all examples of specific descriptions of a witness's demeanor. Moreover, Respondents go on to argue that the Board should review the ALJ's credibility determinations and facts established by the ALJ if the ALJ *only* considers demeanor. If these are simultaneously true, then, according to the Respondents, the Board should give no deference to an ALJ's credibility determinations or factual findings. Surely, this is not Respondents' position.

Second, as demonstrated above, significantly, the ALJ gave numerous and specific explanations of her credibility determinations. Her decision also contains legitimate reasons why she declined to give weight to much of Respondents' evidence. Put simply, the evidence Respondents believe the ALJ improperly ignored was neither probative nor exculpatory. This supposedly ignored evidence to which the Respondents refer is all documentation of the previously-mentioned mismanagement of the workplace by Pendergraft. However, as previously mentioned, aside from Respondents' position that Pendergraft somehow prevented documentation of any employee's behavioral problems (a finding the ALJ declined to adopt), the only value of the documentation offered by Respondents was to show that Pendergraft was a bad manager. This fact is not in dispute and it is not exculpatory because it does not explain DeStefano's consistent failure to contemporaneously document performance issues of those employees who were discharged after they began to organize. As the ALJ explains in her decision, all of the documentation associated with DeStefano's discharges makes repetitious claims of "attitude" problems that the ALJ permissibly interpreted as a euphemism for union activity. ALJD 22:42-43, 23:1-10; see, e.g. *Blue Star Services,* 328 NLRB 638, 639 (1999) (term "bad attitude" constitutes code for union activities); *Schaumburg Hyundai*, 318 NLRB

449, 458 (1995) (owner's statement that employee "did not work well with his team and had a bad attitude" was a euphemism for union animus).

Contrary to Respondents' assertions, the ALJ's judgments were not arbitrary, but were based on the fact that the above considerations made by the ALJ tend to discount Respondents' witnesses' testimony where there was conflicting evidence or conflicting testimony. Further, the ALJ did not "ignore" any probative evidence offered by Respondents in favor of testimony. The Respondents instead failed to offer probative evidence that would exculpate DeStefano's discriminatory conduct. Respondents misinterpret the ALJ's clearly tongue-in-cheek writing as demonstrative of a lack of sufficient basis for her credibility determinations.

D. The ALJ's findings do not demonstrate bias

Respondents ostensibly take general exception to the bases on which the ALJ made various findings in her decision. Specifically, in their brief in support of their exceptions, Respondents argue that the ALJ's decision was governed by bias. The Union's response to Respondents' exceptions concerning alleged bias is similar to its response in the previous section of this brief. In light of the points made in the previous section, Respondents seem to maintain that the ALJ's fact-finding and determinations of credibility were too favorable to the General Counsel's position, thus the Board must find no alternative explanation except bias. Respondents' most substantive argument in support of this claim is that the ALJ "ignored evidence that was harmful to General Counsel's position and reached conclusions that were contrary to the record evidence."

By the first part of their argument, Respondents mean to say that the ALJ erred by giving little weight to much of Respondents' proffered evidence when the ALJ believed the evidence may have been pretextual, non-contemporaneous, or non-probative. These are all appropriate

determinations for an ALJ to make, however. See, e.g. *Pruitt Health Veteran Services-North Carolina, Inc.*, 208 NLRB LEXIS 181, 102 (N.L.R.B. May 4, 2018) (finding that employer's documentation of employee's supposed attendance problems "was part of scheme to create a pretext which would conceal the actual reason for discharging [employee]"); *Rain-Ware, Inc.*, 263 NLRB 50, 56 (1982) (rejecting employer's defense for its decision to lay-off union adherents where the lay-off was "not adequately explained by *contemporaneous* documentary... evidence") (emphasis added); *Avondale Undus., Inc.*, 1998 NLRB LEXIS 269, 146-47, 223-24 (N.L.R.B. February 26, 1998) (rejecting evidence offered both by General Counsel and Employer where found to not be probative as to issue of unlawful conduct). Thus, the Board should not disturb the ALJ's findings simply because Respondents are dissatisfied with the weight given their proffered evidence.

As for the second part of their argument, Respondents believe that the ALJ made findings contrary to the record evidence on two subjects: Kostew's agency status, and Respondents' status as recidivist violators. Respondents first mischaracterize the ALJ's findings concerning Kostew. In short, the ALJ found that Kostew was rewarded for being anti-union and disruptive to organizing efforts. Where the ALJ—as noted by Respondents' brief—said that Respondents actively enlisted Kostew, the ALJ was referring to evidence in the record, including the use of Kostew to relay the message that employees were needed for a last-minute work call. ALJD 63:26-32. The ALJ also properly made the inference that because, as reflected in the record, Respondents ordered employees to listen to Kostew's anti-union, election-eve speech, she was acting as an agent of Respondents where Respondents legally could not make such a speech. ALJD: 63-46-41, citing *Peerless Plywood Co.*, 107 NLRB 427, 429 (1954); *Beverly California Corp.*, 326 NLRB 232, 234-235 (1998) (statements by anti-union employees during captive

audience meeting coercive when manager present expressly called upon them to express their views), enfd. in relevant part 227 F.3d 817 (7th Cir. 2000).

Respondents also take exception to being labeled recidivist violators, arguing that the determination is inappropriate since the prior matter cited by the ALJ is currently on remand with the Board. However, the authority they cite in support is an unpublished decision which explicitly states it "is not binding precedent, except with respect to the parties in the specific case." *Fresh & Easy Neighborhood Mkt., Inc.*, 2012 WL 4424622, at 1 (N.L.R.B. September 25, 2012).

E. The ALJ correctly found violations of § 8(a)(1) and 8(a)(3) in the production department

Respondents take exception to each of the ALJ's findings that Respondents violated 8(a)(1) and 8(a)(3) in the production department. The conduct the ALJ found to have violated the Act included: Respondents' March 15 retroactive wage increase; schedule change for Darnell Glenn and Scott Tupy; discipline of Tupy; assignment of light duty to Urbanski and closer supervision of Urbanski; Thomas Estrada's comments to Alanzi Langstaff that he should "be careful being seen talking to Graham;" Mecca asking Glenn about a union meeting; the creation of the impression of surveillance from Saxe's conversations with Tupy, Glenn, and Prieto; Saxe's solicitation of grievances; DeStefano's "reminder texts" before the election; and Respondents' establishment and maintenance of handbook rules that could be interpreted as prohibiting protected conduct. For each of these actions, Respondents purport to have legitimate justifications. Nevertheless, in each case, the ALJ found that these justifications were either not apparent from the evidence (as compared to the Respondents' apparent anti-union animus) or were outright pretextual.

Likewise, in each instance, the ALJ cited Board law supporting her legal conclusions based on her fact-finding. Respondents' brief does little to challenge or even analyze the ALJ's legal bases for her conclusions. Instead, it primarily asks the Board to overturn much of the ALJ's factual determinations. The Board should decline to do so because (as has been detailed), the ALJ had legitimate bases for each of her factual determinations, including the decision to give little weight to Respondents' supposedly exculpatory evidence.

F. The ALJ correctly sustained several objections warranting the re-count of ballots to include challenged ballots

Respondents take exception to the ALJ's finding that its conduct warranted the counting of challenged ballots or alternatively, a re-election. There were three independent bases on which the ALJ made this finding: Respondents' handbook rules which violated the Act, Kostew's election-eve speech, and Respondents' failure to e-mail the notice of election despite prior regular use of email for workplace announcements. Each of these occurred in the "critical period" and, as the ALJ noted, "unfair labor practice conduct that occurs during the critical period prior to an election is, a fortiori, conduct that interferes with the results of the election unless it is so de minimis that it is 'virtually impossible to conclude that [the violation] could have affected the results of the election.'" ALJD 59:24-30, citing *Intertape Polymer Corp.*, 363 NLRB No. 187 (2016); *Pacific Coast Sightseeing Tours & Charters, Inc.*, 365 NLRB No. 131, slip op. at 10 (2017); *Super Thrift Market, Inc.*, 233 NLRB 409, 409 (1977); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). As such, the Board should not disturb the ALJ's finding that the ULPs were a fortiori conduct that interfered with the election.

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III. CONCLUSION

Based upon the foregoing and for the reasons cited therein, the Charging Party/Petitioner respectfully submits that Respondents' exceptions to the ALJ's Decision are without merit and should be rejected.

Dated this 29th day of October, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 800 Wilshire Boulevard, Suite 1020, Los Angeles, California 90017. On October 29, 2019, I served the document(s) described as **PETITIONER'S ANSWERING BRIEF IN RESPONSE TO RESPONDENTS' EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** on the interested parties by causing copies thereof to be sent electronically to each person listed herein below, as indicated.

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I certify under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, California on October 29, 2019.

Melanie Garion